84632-4

No. ~~84187-0~~

SUPREME COURT OF THE STATE OF WASHINGTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE CENTER FOR ENVIRONMENTAL LAW AND POLICY and SIERRA CLUB,

Appellants,

v.

STATE OF WASHINGTON, WASHINGTON DEPARTMENT OF ECOLOGY, and EASTERDAY RANCHES, INC.

Respondents,

and

WASHINGTON CATTLEMEN'S ASSOCIATION, COLUMBIA SNAKE RIVER IRRIGATORS ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION, NORTHWEST DAIRY ASSOCIATION, WASHINGOTN CATTLEFEEDERS ASSOCIATION, CATTLE PRODUCERS OF WASHINGTON, WASHINGTON STATE SHEEP PRODUCERS and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

APPELLANTS' REPLY AND RESPONSE TO CROSS-APPEAL

JANETTE K. BRIMMER
KRISTEN L. BOYLES
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104
(206) 343-7340
(206) 343-1526 *[FAX]*
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

MISCELLANEOUS

INTRODUCTION

The substantive legal issue in this case is straight-forward: is the stock-water exemption from the ground water permitting requirement of RCW 90.44.050 unlimited in quantity, or is it subject to, and part of, the 5,000 gallons per day ("gpd") limitation on exemptions in that section? As presented in appellants Family Farmers' opening brief, the answer to that question of statutory interpretation must be that the stock-water exemption is limited to 5,000 gpd. Family Farmers' position is based on a reasonable interpretation of the statute, historical evidence concerning the statute's passage, years of prior interpretations by the State itself, and the goals and purposes of the groundwater code as a whole. In response, respondents' affirmative arguments, though presented in several ways, are entirely grammatical, and most notably devoid of any connection to the broader language, function, and goals of the statute. These arguments—built on the narrow assumption that there is only one reasonable way to read the language of RCW 90.44.050—cannot withstand scrutiny.

ARGUMENT—REPLY

I. RESPONDENTS' ARGUMENTS REQUIRE A CONTORTED READING OF THE STATUTE AS A WHOLE.

In order to maintain the "plain language" reading advocated by the State, respondents[1] resort to unreasonable and tenuous readings of RCW

[1] Appellants refer collectively to the respondents and respondent-intervenors as "respondents."

90.44.050. Moreover, their efforts lead away from the overall intent and purpose of the groundwater code and Washington water law generally.

The Washington Legislature passed RCW 90.44.050 in 1945 to strictly regulate the appropriation and use of groundwater, requiring that there would be absolutely no withdrawal of groundwater begun, nor well or other water works constructed, without the user first applying for and being granted a permit from the State. RCW 90.44.050. The legislature provided for two limited categories of exemptions to the permitting requirement: domestic uses, including livestock, and small industrial uses.

In cases of statutory interpretation, a court will glean legislative intent by looking to "all that the legislature has said," reading the statute as a whole, within the context of the larger body of law, and relative to the policy or statutory scheme that the legislature sought to further. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002); *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). This Court recognized the general limited nature of the groundwater permit exemptions in the *Campbell & Gwinn* decision when it found the legislature clearly did not intend unlimited permit-exempt uses of groundwater when the overall goal of the Groundwater Code was to assure protection of existing rights, the public interest, and protection of the resource as a whole. *Campbell & Gwinn*, 146 Wn.2d at 16.

A. Respondents' Plain Language Arguments Rest Entirely On An Overly-Simplistic Grammatical Assumption.

Respondents argue that an unlimited[2] quantity of groundwater is exempt from permitting as long as it is used for livestock.[3] Their position is built entirely on the assumption that there is a "correct" or "true" grammatical way to read RCW 90.44.050. They offer nothing else. If their grammatical argument fails, the entire structure of respondents' plain language argument crumbles as well.[4]

In particular, the State's argument (State Br. at 15) simply restates its conclusion that there are four distinct categories of permit exemptions

---

[2] Respondents continue to object to the use of the word "unlimited," arguing that the stock-water exemption is in fact "limited" by the number of livestock. This is a nonsensical and diversionary argument. While true that the "livestock" exemption applies to "livestock," and not to other water uses, that fact has no bearing on this case. There is no water quantity limit in the respondents' interpretation of RCW 90.44.050, nor is there a livestock limit. A livestock owner is allowed permit-exempt use of groundwater for as many head of cattle or sheep or hogs or chickens that the owner cares to keep, and therefore, such use is unlimited.

[3] The State also appears to believe that there is no quantity limit for groundwater used on one half acre of lawn or any size noncommercial garden, State Br. at 14-15, making all these exempt uses additive: unlimited for stockwater, another unlimited quantity for lawn and garden, and 5,000 gpd for "domestic" uses. *Id.* This further demonstrates the unreasonableness of the State's interpretation in that it creates an impossible situation for monitoring or enforcement when a user falls within more than one category.

[4] Regardless of the grammatical accuracy, this Court has noted that "[t]he purpose of enactment should prevail over express but inept wording." *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

with stockwater unlimited in quantity. The State, repeating the Attorney General's opinion, argues that the legislature had no intention of limiting stockwater to within the 5,000 gpd domestic bundle of uses, and this argument is based entirely on the placement of commas. There is nothing else in that paragraph. The State then builds its house of cards. By relying on this "deliberate use" of the limitation (apparently "deliberate" due to the comma placement and sentence structure), the State argues that "it must be presumed" that the legislature did not intend to limit stockwater. State Br. at 15. Those bare conclusions are supportable only if there is "one true" grammatical reading for RCW 90.44.050, a reading that runs counter to the overall purpose of the statute, and does not conform to a cohesive reading of RCW 90.44.050 as a whole.

B. The Respondents' Presumptions Based Upon One "Correct" Grammar Are Unreasonable When Read Within the Statute As A Whole.

1. The State's interpretation cannot be squared with the first proviso.

The State's plain language argument in favor of a stockwater permit exemption for unlimited amounts of groundwater contradicts the overall scheme and purpose of the Groundwater Code. This is easily seen when applying the State's interpretation to the first proviso and its use of the phrase "any such small" withdrawals. The State attempts to redefine the word "small" in order to explain away evidence of the legislature's intent to limit non-permitted groundwater use. As noted in the Family

Farmers' opening brief at 20-21, both provisos following the exemptions set forth in RCW 90.44.050 refer to "any *such* small" exempt withdrawals, the word "such" referencing the preceding exemption categories.

Reading the statute as a whole, along with the overall intent of the Groundwater Code, dictates that the legislature, in drafting this proviso, did not intend the stockwater permit exemption to be unlimited in quantity and that all of the listed exemptions were subject to the 5,000 gpd limitation. The State's suggestion, State Br. at 20, that the legislature simply used the term "small" as "short-hand" that encompassed an exemption unlimited in quantity or as large as the one claimed in this case (600,000 gpd) is a stretch that is implausible and unsupported. "Small" does not mean "unlimited" in anyone's lexicon.

Further, there is no support for the respondents' claims that "small" uses really just means uses relative to all other surface or groundwater uses. Nothing about the language of RCW 90.44.050 suggests that the legislature was comparing exempt groundwater uses to total water use. The State's random citation to other types of surface and groundwater uses is a statistical sideshow with no bearing on legislative intent in 1945.

Indeed, the legislature underscored its intent to limit all exempt uses to small amounts elsewhere in the Water Code. For example, RCW 90.14.051 sets forth the procedures for stating a claim for water, providing for a "short form" claim for uses that are listed as exempt in RCW

90.44.050 and referring to such exempt uses as "such minimal uses." Reading the statute as a whole, the language of "any such small" amount referred to the specific exemptions in RCW 90.44.050 and was meant to convey that the legislature intended the exemption to be read as limited.[5]

Finally, the debate about what "small" might really have meant simply points up the overall ambiguity in RCW 90.44.050. If, as the respondents suggest, one person's "small" is another person's "unlimited," there is no plain language reading of the RCW 90.44.050 available, and it is appropriate for the Court to turn to additional sources to aid it in determining the legislature's frame of reference and intent.

2. The respondents' arguments regarding the second proviso and permitting for exempt uses is unreasonable and internally inconsistent.

The State's and the Agricultural Associations' explanation of how their interpretation of the statute corresponds with the language of the second proviso simply does not comport with standard English. More importantly, this interpretation leads to the absurd result that only domestic wells and small industrial uses that everyone agrees are limited to the 5,000 gpd exemption can get water permits. State Br. at 23.

The second proviso follows closely on the heels of the legislature's

[5] The Agricultural Intervenors' lengthy discourse (at 21-23) on the definition of the word "any" has no bearing on the issues before the court. The legislature placed the word "any" at the beginning of the exception so that it modifies "withdrawal of public groundwaters" and applies to *each* of the categories of exempt water use, including those categories that respondents agree are modified by the 5,000 gpd limit.

reference to the exemptions as "such small uses," and it states, "that at the option of the party making withdrawals of groundwaters of the state *not exceeding 5,000 gallons per day*, applications under this section...may be filed and permits and certificates obtained in the same manner and under the same requirements as in this chapter provided in the case of withdrawals *in excess of 5,000 gallons per day.*" RCW 90.44.050 (emphasis added). In this text, the legislature plainly delineated two basic categories of water use created by the statute: those that are less than 5,000 gpd and those that are greater than 5,000 gpd. For those that are less, the language demonstrates that no permit is required, but that a permit could be obtained in the same way that the users in excess of 5,000 gpd obtain the required permit. This is the reasonable reading of the second proviso as opposed to the State's complicated and tenuous one, which leaves some exempt uses completely unable to ever document their rights with permits. It is unreasonable and unnecessary to reach for this interpretation.

The State's arguments regarding the second proviso are also inconsistent with the State's own interpretation of the permit-exemption in RCW 90.44.050—that exempt uses are exempt only from permitting, but they are otherwise fully subject to all other requirements and benefits of Washington's water laws. State Br. at 10 and 38. There is simply no evidence that the legislature carved out the permit-exempt stockwater use and the lawn and garden use to forbid them from obtaining documentation through a valid water right permit. In fact, it is clear from the entirety of

the Water and Groundwater Codes that just the opposite is true: the legislature favored and encouraged, and in almost all instances required, permits for all surface or groundwater use.[6]

C. The *Kim* Case Does Not Provide Support For The Respondents' Plain Language Claims.

In *Campbell & Gwinn*, the decision most relevant to this case, this Court refused to fashion an interpretation of the domestic exemption in RCW 90.44.050 to fit current development practices that would allow a large quantity of water to be used without permits. The Court found that allowing such a large use would be clearly contrary to legislative intent to limit and control unpermitted water use.

To counter the import of *Campbell & Gwinn*, a broad acknowledgement that the legislature did not intend to allow unlimited, unpermitted groundwater use, respondents turn to dicta from the Court of Appeals in *Kim v. Pollution Control Hearing Bd.*, 115 Wash. App. 157, 163, 61 P.3d 1211 (Wash. App. Div. 2, 2003). In *Kim*, the stockwater exemption was not at issue and was not argued by the parties. Yet even in *Kim*, the Court of Appeals made note of Ecology's interpretation of the

[6] For example, RCW 90.44.105 provides that the holder of a groundwater permit may consolidate that right with an exempt well (making no distinction as to type or use of the exempt well), resulting in a permitted consolidated right. The section sets forth requirements for consolidation, including proof that the exempt well will shut down and be decommissioned, and that consolidation include legally-enforceable agreements that prohibit construction or use of additional exempt wells.

stock-water exemption as not available to commercial animal-rearing operations such as feedlots. *Kim*, 115 Wash. App. at 161. Feedlots, according to the appellate court, fall under the industrial limitation of 5,000 gallons per day or less. *Id.* at 163. This observation by the Court of Appeals highlights the internal inconsistency in its own dicta: it makes no sense that a "feedlot" is limited to 5,000 gpd in the *Kim* court's dicta, yet "stockwater" is unlimited in amount.[7]

If dicta is to be a guide, then this Court would be better served to look to its own assessment of the stockwater exemption in *Postema v. Pollution Control Hearing Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000). In *Postema*, this Court observed, "As [Postema] points out, RCW 90.44.050 allows domestic and stock watering uses of up to 5,000 gallons without a permit...." *Postema*, 142 Wn.2d at 89. The Court accepted this statement of how to interpret the exemption without question.

The issue here of the limits of the stockwater exemption, if any, is one of first impression. It was not squarely before the *Kim* or the *Postema* courts. Only the *Campbell & Gwinn* decision give general guidance regarding the legislative intent to regulate and conserve groundwater use through permitting and the inclusion of quantity limits on exempt uses.

---

[7] The Court of Appeals' internal inconsistency further emphasizes the ambiguous nature of RCW 90.44.050's language. Moreover, if *Kim* is indeed the last word on stockwater as advocated by respondents, they can't have it both ways. Easterday Ranches is clearly a feedlot and therefore should be subject to the industrial uses limitation of 5,000 gpd.

D. The State's Purposeful Misreading of the Family Farmers' References to Rural Households is a Diversion.

The State uses a purposeful misreading of the Family Farmers' references to rural households to set up a straw man argument that is a waste of the Court's and the parties' time. State Br. at 18-20. At no point in this case have the Family Farmers' suggested that the domestic use exemption to permitting for groundwater use is limited to rural households or that the ruling in *Campbell & Gwinn* applies only to rural households. Rather, as part of the overall discussion of livestock as part of domestic uses and as part of the analysis of the historic documents and context, the Family Farmers discussed that the legislature was considering rural settlement issues when it included livestock watering in the domestic use exemption. The State lifts this natural part of the discussion out of context and claims to knock down an argument the Family Farmers do not make.

II. THE RESPONDENTS' ARGUMENTS REINFORCE THE CONCLUSION THAT RCW 90.44.050 IS AMBIGUOUS AND THAT IT IS APPROPRIATE FOR THE COURT TO TURN TO ADDITIONAL SOURCES OF INFORMATION REGARDING THE ACTIONS AND INTENT OF THE 1945 LEGISLATURE.

A. The Court Is Left With Two Reasonable Interpretations And An Ambiguous Statute.

Contrary to respondents' assertions, there are two reasonable interpretations of RCW 90.44.050: the interpretation urged by Family Farmers and used by the State for 60 years that stockwater is part of the bundle of domestic uses limited to 5,000 gpd, and the newer 2005 Attorney General interpretation that exempt stockwater use is unlimited.

The Family Farmers' reading is reasonable given that it controlled the State's application of RCW 90.44.050 for 60 years; it was upheld by an administrative adjudicator in the face of specific challenge; and judges applied it in water rights adjudications over that period of time.[8]

The State's manipulation of the Family Farmers' "fruit analogy"[9] simply serves to emphasize the statute's ambiguity. The State claims to manipulate the analogy to make it "parallel" to RCW 90.44.050, but in fact, the State still doesn't get it right.[10] Following the State's reasoning on the fruit analogy, it should say: I eat apples, small bananas, and pears that aren't rotten. Once again, the reader is left to wonder what the word rotten modifies because surely, it is unreasonable to think that the speaker eats rotten apples and rotten small bananas. Similarly, it is not reasonable to think that the legislature provided for unlimited permit-exempt use of groundwater in a statute intended to limit and regulate groundwater use.

---

[8] The State asks this Court to disregard years of adjudications because the interpretation of the stockwater exemption was possibly not challenged in those adjudications. The lack of challenges should lead to the opposite conclusion. The limitation on the permit-exempt use of groundwater for livestock was apparently accepted as correct for 55 years (until the challenge in *DeVries v. Dep't of Ecology*, PCHB 01-073 (2001)). At a minimum, it demonstrates the interpretation was reasonable.

[9] The Family Farmers' initial brief used a phrase "I eat apples, bananas, and pears that aren't rotten" to demonstrate the inherent ambiguity in phrases using serial commas, such as in RCW 90.44.050.

[10] The State manipulates the analogy to say, "I eat apples, bananas that are yellow, plums that aren't rotten, and pears that aren't rotten" which of course is clear in a manner that RCW 90.44.050 has never been.

In the end, the crazier the fruit-basket upset, the more apparent it becomes that the statute is ambiguous.

B. The State Argues For An Insupportably Rigid Application Of The Last Antecedent Principle.

The State also highlights the presence and absence of commas in the exemption language to argue for application of the principle of the last antecedent in order to resolve any ambiguity in the statute. Courts, however, refuse to apply that principle when to do so is contrary to the overall intent of the legislature or where it would lead to untenable results. *Clark County Public Utility Dist. No. 1 v. Washington Dep't of Revenue*, 153 Wash. App. 737, 754-55, 222 P.3d 1232 (Wash. App. Div. 2, 2009) (courts do not apply the last antecedent rule as inflexible or binding and will examine the implications of its application relative to the overall statutory scheme); *In re Smith*, 139 Wn.2d 199, 204-05, 986 P.2d 131 (1999) (court declines to apply last antecedent rule where to do so "makes no sense" or "leads to absurd result.") *See also Nobelman v. American Sav. Bank*, 508 U.S. 324, 330-31, 113 S. Ct. 2106, 2111 (1993).[11]

[11] Professor Adams (cited in the Family Farmers' opening brief) confronts the argument about commas and the last antecedent in a July 31, 2010 article. Professor Adams notes: "Whenever I hear a lawyer refer to "normal rules of English grammar," my heart sinks, as usually it's used to support an interpretation that is in fact highly debatable....In referring to "normal rules of English grammar," [the attorney] is, whether he knows it or not, alluding to the comma test under 'the rule of the last antecedent.' That's an arbitrary rule of construction that has zero to do with how people actually write." AdamsDrafting.com, Talk of Commas at a Chrysler Bankruptcy Hearing,

The *Smith* case is particularly instructive. In *Smith*, the Court found that interpreting the statute in accordance with the last antecedent rule was problematic because either the court had to be inconsistent in its application of the rule for the statute to make any sense at all, or, if it applied the rule in a consistent fashion to all clauses in the statute, the resulting interpretation was unreasonable. *Smith*, 139 Wn.2d at 204-05.

Here, rigid application of the rule will lead to the absurd result of an unlimited, unpermitted use of water, exempt from the reach of the statute, the purpose of which is to control, regulate, and conserve all but small uses of groundwater. Rigid application of the rule is also clearly contrary to the historic record and the legislative intent evidenced by it. Moreover, application of the principle makes the State's position internally inconsistent. The exemption provisions, as in *Smith*, actually have two modifiers within the exemption and applying the last antecedent consistently leads to absurd results. If the 5,000 gpd only modifies the domestic exemption, then the half-acre limitation can only modify the garden exemption, but not the lawn exemption. The State's position with respect to application of the last antecedent rule quickly crumbles into an exercise in nonsense. The only reasonable reading in accordance with all these considerations is that the 5,000 gpd modifies *all* the exemption provisions, including stockwater.

---

http://www.adamsdrafting.com/2010/07/31/talk-of-commas-at-a-chrysler-bankruptcy-hearing (last visited Oct. 5, 2010).

III. THE HISTORIC EVIDENCE IS THE BEST INFORMATION AVAILABLE TO DISCERN LEGISLATIVE INTENT.

Even in the case of an ambiguous statute, a court's primary objective is to discern the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 12. In so doing, a court may look to the legislative history which includes the circumstances leading up to and surrounding the statute's enactment, *Restaurant Dev., Inc. v. Cannanwill*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) (citing Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 203 (2001)); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004), as well as the historical context within which the statute was passed to identify the problem the legislature intended the statute to solve. *Washington State Nurses Ass'n v. Bd. of Med. Exam'rs*, 93 Wn.2d 117, 121 605 P.2d 1265 (1980). Respondents are incorrect to reject government reports that were drafted and/or published at the time of the statute's passage or contemporaneous newspaper accounts of its passage and meaning.

Respondents prefer the Court simply guess at legislative intent due to the lack of committee reports or other "official" legislative history. The simple fact is that this Court is confronted with an ambiguous statute from 1945 and no "official" history, yet it still is obligated to discern, as best as possible, the intent of the 1945 legislature. Despite an absence of "official" history, there are numerous reports from the bill's sponsors, from federal and state agencies studying the problem of well use for rural

homesteads, including livestock, and numerous accounts of the official agency interpretation contemporaneous with and immediately following the statute's passage. These reports and accounts provide valuable insights for the Court in interpreting an old, ambiguous statute. It is proper and logical, as recognized by this Court's prior decisions on statutory interpretation, for the Court to avail itself of these materials to discern legislative intent, as opposed to accepting the invitation of respondents to simply throw up its hands and guess.

A. Agency Interpretations Contemporaneous With A Statute's Passage Are Valuable In Assessing Legislative Intent.

In the case of ambiguous statutes, the Court will give substantial (though not controlling) weight to an agency's interpretation or that of the Attorney General only if it is not contrary to legislative intent. *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001). Where there are competing official interpretations, the agency interpretations that were contemporaneous with the law's passage are of most assistance to a court in assessing historical context and legislative intent. *Mehlhaff v. Tacoma School Dist. No. 10*, 92 Wash. App. 982, 987, 966 P.2d 419 (Wash. App. 1998) (citing *Green River Cmty. College v. Higher Educ. Personnel Bd.*, 95 Wn.2d 108, 117-18, 622 P.2d 826 (1980)).

Contrary to the unsupported claims of the respondents, the agency's interpretation of RCW 90.44.050 as limiting permit-exempt

groundwater use to 5,000 gpd remained consistent from the end of the 1945 legislative session to its position in *DeVries v. Dep't of Ecology*, PCHB 01-073 (2001) almost 60 years later. The agency's position is represented through statements by the Director of Conservation immediately following the statute's passage (the agency with the authority to interpret and implement the new legislation in 1945), agency statements in official reports to the legislature, and the legal position adopted by the agency in the *DeVries* litigation.

The statement of an agency director is definitely entitled to weight, particularly when it is consistent with the later official agency reports to the legislature. Cases cited by the State in urging the Court to disregard this important information do not apply here. In 1945, the Director of Conservation was not contradicting any case law regarding the newly-enacted RCW 90.44.050. Therefore, the *Satterlee v. Snohomish County*, 115 Wash. App. 229, 236, 62 P.3d 896 (Wash. App. 2002) case does not apply. Further, his interpretation of the statute was followed the next year with the official agency report on application of the new law. That interpretation was repeated in the following two reports and by the agency in the *DeVries* litigation many years later. [12] CP 624-25; 447-48; 456-57.

[12] Easterday Ranches persists in its claim "the legislature" reacted to the *DeVries* decision by raising objections with the Attorney General and that such reaction constitutes legislative intent. This is wrong. A letter to the Attorney General from four legislators is not action by the legislature or "reaction" of the legislature. *See City of Yakima v. Int'l Ass'n of Firefighters*, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991) (statements by

Therefore, this case is also distinctly unlike that of *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 611-12, 998 P.2d 884 (2000) where the Court declined to give deference to a short article in an agency bulletin that lacked official, definitive analysis.

Moreover, the State's claim that statements of the Director of Conservation were not those of the agency is unsupportable, as is its claim that the state's position in *DeVries* was not clear. In Washington, full authority for an agency's decisions (and by extension implementation of a law) is vested in the agency's director who acts and speaks for the agency. *See, e.g., Salmon for All v. Dep't of Fisheries*, 118 Wn.2d 270, 277, 821 P.2d 1121 (1992) (court notes the basic principle that agency decision-making authority resides with the single director of the agency).

Finally, the State is incorrect in its application of *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), to this case. In the *Theodoratus* case, Ecology had been out of compliance with well-established Washington case law for years. *Theodoratus*, 135 Wn.2d at 598. The change in Ecology's practice under review in *Theodoratus* brought Ecology into compliance with existing case law. *Id.* Here, there is no body of existing Supreme Court case law. Moreover, the Attorney

---

individual legislators not contemporaneous with passage of statute are not legislative history, much less action by the legislature); *Washington Economic Dev. Finance Auth. v. Grimm*, 119 Wn.2d 738, 756-57, 837 P.2d 606 (1992) (remarks of individual legislators made during the session are not conclusive of legislature's intent).

General's recent, 2005, interpretation is *inconsistent* with years of water rights adjudications and the decision of the Pollution Control Hearings Board in *DeVries*.

B. The Historical Documents Provide Insight Into The Information And Concerns Before the Legislature.

The documents from the Association of Washington Cities show the overall concern with conserving and regulating groundwater resources, a concern echoed by the legislature throughout the Groundwater Code and a concern that is inconsistent with unlimited groundwater use by any entity or group. CP 551; 559. The Department of Interior, Bureau of Reclamation ("BOR") studies of the Columbia Basin were also an important part of the historical context for the Groundwater Code. CP 564; 591; 597; 601-03. Each of these documents supports the overall purpose and intent of the Groundwater Code to carefully regulate and conserve groundwater resources. Each of these documents supports an interpretation of RCW 90.44.050 that includes use of water for livestock drinking purposes as part of a bundle of domestic rights explicitly limited to 5,000 gpd in order to further the purposes of regulation and conservation. Indeed, some of the language and concepts from the historic reports are present in the statute itself. *See e.g.* CP 569-70; 603. Respondents provide no reasonable arguments or evidence contrary to the conclusions from these documents. Rather, they attack the evidence only from the periphery, misquote the reports, and misdirect attention with

complete speculation.

While Respondents attempt to discount summaries of the bill from contemporaneous newspaper accounts as not "legislative history," such accounts of the legislation are important to the Court's analysis of how the legislature and the public were thinking about water issues at the time. Further, a contemporaneous journalistic account of legislation at the time of its passage would tend to be a more accurate reflection of what the legislation meant at the time than most efforts to reconstruct the meaning 60 years later.

The historic documents all point in the same direction. The legislature was asked to protect and preserve groundwater as an important resource for the State of Washington. The legislature would have been aware of the research behind efforts to settle the central, drier parts of the state as well as the Association of Cities' concerns. The legislature plainly stated its intent to regulate and control groundwater in a manner similar to that employed for surface water, and the legislature employed a strict permitting system in RCW90.44.050 to ensure that its intent was carried out. Immediately following its passage, historic documents from the agency tasked with implementing the new law demonstrate that the agency perfectly well understood that the exemptions from permitting were limited in nature and amount. Respondents show nothing from the historic record that supports their more recent interpretation of the law. The weight of the evidence supports a limiting interpretation.

C. Information And Arguments Regarding Total Numbers Of Livestock Are Extraneous To The Issues In This Case.

Respondents spend significant text telling the Court a lot about the agricultural industry in this state, historically and currently. While interesting, the discussion again simply diverts attention from the narrowly-focused question of statutory interpretation this Court must decide. Respondents provide no information that is useful to this Court in assessing legislative intent or parsing the language of RCW 90.44.050.

Respondents take great pains to point out that total Washington state livestock numbers were higher in 1945 than they are today and the number of farms fewer. It is unclear to what end this information is offered, but it appears to be in support of an argument that the legislature thought that unlimited stockwater use was acceptable in total in 1945. There is no support other than livestock numbers given for this contention.

Importantly, total livestock numbers statewide in 1945 say nothing about intensity and location of water use—facts that are essential to understanding the impact of groundwater use on the resource. Respondents fail to provide or discuss facts regarding where the livestock were located then versus now, and how much water any given farm used for livestock. Current livestock operations now are likely much more consolidated into large, intensive operations,[13] as opposed to small

[13] Support for this is provided by the respondents themselves in their demonstration of fewer farms in present time.

homesteads as described in the BOR reports. Many of the operations in 1945 came within the 5,000 gpd limit as demonstrated by the BOR reports' conclusions based upon the citation to studies showing total number of animals on a farm that would be supported by the 5,000 gpd limit. CP 569-70; 603. If farms in 1945 mostly came within the 5,000 gpd limit, then the conclusion implied by the respondents regarding legislative assumptions and intent would be false. The more supportable conclusion from what is known is that the legislature assumed all livestock would be amply supported with a 5,000 gpd domestic limit. Without the additional information regarding location and intensity of use then and now, the total number of livestock in the state is utterly meaningless for the question before the Court.

IV. THE COURT SHOULD DECLINE THE AGRICULTURAL ASSOCIATIONS' INVITATION TO DISREGARD EVIDENCE OF LEGISLATIVE INTENT IN 1945 IN FAVOR OF CURRENT PREFERRED PRACTICES.

As a last resort in the face of the historical evidence, the Agricultural Associations argue that the Court should allow unlimited, unpermitted groundwater use for livestock to avoid economic damage to current large livestock operations. None of this information goes to the legislature's intent in 1945 and is of little benefit to the Court in interpreting RCW 90.44.050.

What is more, the Agricultural Associations mischaracterize (or misunderstand) the point of this case. The issue is not whether the various

livestock operations can use water or get a water right, but rather whether they need a permit. If the Court determines that the Family Farmers are correct in their interpretation of RCW 90.44.050, livestock operations are not immediately denied access to groundwater. It would simply mean that if a livestock operation was going to use more than 5,000 gpd, it must apply for and obtain a permit or purchase or otherwise obtain an existing water right—the same rule and practice that governed livestock operations from 1945 to 2005. In other words, livestock operators wishing to use more than 5,000 gpd of groundwater must follow the rules that all other larger water users must follow, nothing more, nothing less. To the extent that some of the Agricultural Association declarants suggest that they will be unable to obtain water permits due to scarcity, they emphasize the very heart of the problem and the need for regulation of larger uses of groundwater. If water is not available or in short supply, allowing unlimited pumping of groundwater will obviously cause or exacerbate the very problem the Groundwater Code was meant to address in 1945.

RESPONSE TO CROSS-APPEAL OF EASTERDAY RANCHES, INC.

I. APPELLANTS EACH HAVE DEMONSTRATED STANDING.

In an argument notably not joined by other respondents, Easterday Ranches continues to press upon an apparent misunderstanding of the nature of this case. Easterday Ranches argues that the Family Farmers lack standing, but simultaneously and confusingly objects to the very

declarations that must be used to demonstrate standing. Easterday Ranches also persists in its failure to appreciate the nature of an action under the Uniform Declaratory Judgments Act ("UDJA"), the proper process for obtaining review of an interpretation of a statute as compared to a local land-use decision.

A. Washington Applies A Two-Part Test For Standing And Does So In A Liberal Fashion When The Suit Is Of Substantial Public Importance.

The Washington courts use a two-part test to decide whether a plaintiff has standing under the UDJA. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (*Grant County II*). First, a party must be within the "zone of interests to be protected or regulated by the statute" in question. *Id.* (internal quotation marks omitted) (quoting *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the party must have suffered, or will suffer, an "injury in fact." *Id.* (internal quotation marks omitted). *See also To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001); *American Legion Post # 149 v. Dep't of Health*, 164 Wn.2d 570, 593-94, 192 P.2d 306 (2008). This is the same standard that Washington courts use for other controversies:

> First, we ask whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question. Second, we consider whether the party seeking standing has suffered from an injury in fact, economic or otherwise. Both tests must be met by the party seeking standing.

Branson v. Port of Seattle, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). An organization:

> has standing to bring suit on behalf of its members when the following criteria are satisfied: (1) the members of the organization would otherwise have standing to sue in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members.

Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002). *See also Okanogan Wilderness League v. Dep't of Ecology*, PCHB No. 98-84 (Nov. 24, 1998), at 4 (holding that an interest in the wildlife of the Dungeness River qualified as a cognizable interest upon which to base an injury in fact); *CELP v. Dep't of Ecology*, PCHB No. 96-165 (Jan. 7, 1998) (basing finding of injury in fact on CELP members' enjoyment of aesthetic, recreation, and wildlife values present in the Columbia and Walla Walla Rivers).

Plaintiffs asserting a procedural injury "need not show that the substantive environmental harm is imminent." *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 n.3 (9th Cir. 2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.") [14] Plaintiffs asserting procedural injury must establish that

[14] Washington courts have noted that Washington's test is "drawn from

"(1) the [defendants] violated certain procedural rules; (2) these rules protect [plaintiffs'] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003).

Finally, courts adopt a "less rigid and more liberal" approach to standing when the suit concerns an issue "of substantial public importance, [that] immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Grant County II*, 150 Wn.2d at 803 (citation omitted). While the parties meet the standing requirements of Washington law, it is also clear that this case involves a controversy that is of substantial public importance, that immediately affects significant segments of the population, and that has a direct bearing on agriculture.

B. The Plaintiffs Are Each Within The Zone of Interests Protected By The Groundwater Code And Will Be Injured By Ecology's Interpretation Of The Permit Exemption For Livestock Watering As Unlimited.

Scott Collin, Sheila Poe, and Randolph Jones are all members of the Five Corners Family Farmers and of CELP. Each of them live near and/or own property near the Easterday Ranches' proposed feedlot (Ms. Poe, immediately across the road; Mr. Collin, less than a mile down

---

and explained by federal case law." *Allan v. University of Washington*, 92 Wash. App. 31, 36, 959 P.2d 1184 (Wash. App. 1998).

Gertler Road). They rely entirely on groundwater wells for their homes and property. The Family Farmers, whose senior water rights are directly jeopardized by the unlimited use of permit-exempt wells that draw on the same *declining* aquifers, are within the zone of interests protected by the groundwater code—indeed, Washington law specifically provides that no new withdrawals may injure their interests. *See* RCW 90.03.290. Mr. Collin is also an applicant for a new groundwater right in Franklin County so that he may diversify his farm business. CP 925. Unfortunately, his application remains pending and will likely never be granted based upon Ecology's statement that there is no groundwater currently available for granting new rights in Franklin County. *Id.* Allowing unlimited, unpermitted use of groundwater for watering livestock at Easterday Ranches (or any other feedlot in the area) allows users that are later in the queue to jump ahead of Mr. Collin and injures prior users like Mr. Collin, Ms. Poe, or Mr. Jones who have abided by the law and rules, including prior appropriation law.

Ecology treats all aquifers in the Columbia Basin as connected.[15] Ecology's treatment of the Wanapum and Grande Ronde aquifers as

[15] Indeed, this was an important and specific finding in Ecology's approval of the Pepiot Transfer—Easterday's transferred water right not at issue in this case. There, Ecology found that, despite the fact that the Easterday Ranches had drilled their well much deeper than the original Pepiot well, the well should be considered as drawing from the same aquifer, a necessary finding for the approval of the transfer. *See* CP 870-71.

connected is completely supported by the U.S. Geological Survey maps (the best science regarding these aquifers) showing groundwater flow across the Columbia Plateau and connection of aquifers. CP 892; 896-97; 902; 921. It is further accepted science that all aquifers in the Columbia Plateau are in steep decline as water is mined from the aquifers (withdrawn in excess of recharge). *Id.*

The Five Corners Family Farmers' potential for injury in this case is real and extreme. As noted in the declarations, without well water, the homes and properties of the Five Corners Family Farmers become uninhabitable. CP 925; 852; 846-47. Perhaps most importantly, waiting until Scott Collin's or Sheila Poe's wells dry up defeats the entire purpose of UDJA litigation and creates a situation where they can get no redress at all from the courts. The point of groundwater regulation is to require permits and the analysis that is part of the permitting process: assessing senior water rights, impairment risk, and the broader public interest. The permit system protects senior rights and Washington's water resources *before* there is harm. The point of this litigation is to limit the amount of water use that is not subject to the protective regulatory requirements—a process injury as well as a substantive injury to the Family Farmers' wells. If water resources and wells must be irreversibly ruined before plaintiffs can obtain a declaration from a court regarding the interpretation of the statute, there can never be any redress for these particular plaintiffs. This makes no sense and is not the intent of standing requirements.

CELP and Sierra Club, whose interests include promoting sustainable water use throughout the state to support wildlife, recreation, and responsible development, are also within the zone of interests protected by the water code as well and have standing in this case. *See, e.g., CELP v. Dep't of Ecology*, PCHB No. 02-216 (June 4, 2003) (CELP had standing to challenge the validity of a water rights application); *CELP v. Dep't of Ecology*, PCHB No. 96-165 (Jan. 7, 1998) (CELP members' enjoyment of aesthetic, recreation, and wildlife values present in the Columbia and Walla Walla Rivers were the types of interests protected by the Water Resources Act of 1971). CELP's primary mission is preservation of ground and surface water resources, a goal directly contrary to Ecology's current interpretation of the permitting exemption. CP 886-87. Members of CELP and the Sierra Club use and rely on groundwater and surface water in the state for drinking and for recreation. *Id.* and 857-58. CELP's and the Sierra Club's work on surface water sustainability and habitat in the Columbia River system is directly impacted by unsustainable groundwater withdrawals in the Columbia Plateau as is evident from the USGS information regarding the Columbia Plateau groundwater flow. In particular, Sierra Club's and CELP's significant efforts at restoring and maintaining instream flows for salmon in the Columbia and its tributaries will be quickly eroded and fruitless if Ecology's interpretation allowing unlimited, unregulated groundwater use stands.

C. Standing Declarations Are Taken By This Court As True, Needing Only To Allege Facts That Demonstrate Injury To The Plaintiffs' Interests.

Easterday Ranches' misunderstanding of the law of standing is evident in its continued, misguided attempt to strike the very declarations upon which standing is grounded. Both the United States Supreme Court and the Ninth Circuit have held that, for purposes of summary judgment, facts averred by the plaintiff with respect to standing must be taken as true. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (in response to a summary judgment motion challenging a plaintiff's standing to bring suit the plaintiff need only "set forth by affidavit or other evidence specific facts ... which for purposes of the summary judgment motion will be taken to be true.") (internal quotations omitted); *Alaska Wildlife Alliance v. Jensen*, 108 F.3d 1065, 1068-69 (9th Cir. 1997) ("At the summary judgment stage, factual allegations in support of standing are taken as true. *Lujan*, 504 U.S. at 561. Plaintiffs need only plead facts that, taken as true, would show that [government authorized activity] caused their injuries.").

In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167 (2000), the U.S. Supreme Court found that the plaintiff's concerns that pollution from a facility would be harmful were sufficient to establish standing to sue:

> For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked

> and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges.

Laidlaw, 528 U.S. at 181-82. While a plaintiff must allege by affidavit specific facts demonstrating injury, *Lujan*, 504 U.S. at 561, the U.S. Supreme Court has been clear that standing declarations need not prove the environmental injury on which allegations of injury are based:

> The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, *post,* at 713-714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.

Laidlaw, 528 U.S. at 181. Neither proof of actual pollution, nor proof that the pollution had actually harmed the plaintiff, was required to establish standing; rather, the plaintiff's declaration that he was "concerned" that the river was polluted was enough. *Id.*

Standing declarations are fundamentally different from evidence offered to prove questions of fact material to a disposition on the merits.[16] For this reason, courts allow standing declarations to be submitted even if those affidavits would not be admissible were they offered as evidence

[16] Indeed, in this case, there is little overlap between the facts relevant to the merits and the facts relevant to standing. The question to be decided on the merits is the proper interpretation of the exempt well statute; whether or not the Family Farmers' senior water rights or organizational interests will be damaged is not relevant to that question.

relevant to a disposition on the merits. *See, e.g., Northwest Envtl. Defense Ctr. v. Bonneville Power Admin.,* 117 F.3d 1520, 1528 (9th Cir. 1997) ("We therefore consider the affidavits not in order to supplement the administrative record on the merits, but rather to determine whether petitioners can satisfy a prerequisite to this court's jurisdiction."). Indeed, courts have explicitly found that standing declarations may be submitted despite the fact that those declarations contain opinion testimony that is "expert-like" and would be inadmissible to determine questions on the merits. *Environmental Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1121 (N.D. Cal. 2004).

Even if the Family Farmers' declarations were to include information more extensive than that customarily admitted at a trial on the merits, the statements would be admissible and indeed appropriate for the purposes of establishing their standing to bring this action to court. Moreover, as is abundantly clear upon closer review of the declarations and the objections thereto, the statements are for the most part admissible under even the standard rules of evidence.

D. The Family Farmers' Declarations Are Appropriate And Demonstrate Standing.

The Family Farmers' declarations appropriately establish that they are threatened with injury due to Ecology's erroneous interpretation of RCW 90.44.050. The Family Farmers' economic, recreational, and organizational interests are and will likely be injured by Ecology's failure

to require permits for groundwater use exceeding 5,000 gallons per day. The Family Farmers' declarations contain specific factual allegations of injury, including allegations of potential harm to their homes and livelihood and to their recreational and aesthetic interests in the surface waters and connected groundwater in the state of Washington. These allegations must be taken as true, and are sufficiently specific and detailed to establish the Family Farmers' requisite injury. *Lujan*, 504 U.S. at 561.

The Family Farmers are not obligated to prove that Ecology's flawed interpretation of the exempt well statute will cause their wells to dry up, nor must they prove that the rivers of Washington will cease to be usable for recreational and aesthetic purposes in order to establish their standing at the summary judgment stage. *Laidlaw*, 528 U.S. at 181-82; *Lujan*, 504 U.S. at 561. Moreover, because the Family Farmers' declarations go not to the merits but to the Court's jurisdiction, they are admissible even where merits affidavits might not be. *Northwest Envtl. Defense Ctr.*, 117 F.3d at 1528; *Environmental Prot. Info. Ctr.*, 389 F.Supp.2d at 1121. The Family Farmers have sufficiently demonstrated that they have standing to bring this declaratory judgment action.

All of Easterday Ranches' evidentiary objections mistake the Family Farmers' standing declarations for declarations offered to prove facts material to a disposition on the merits,[17] and Easterday Ranches'

[17] Again, this case is not a basic property damage or water rights adjudication case, but rather a case about proper statutory interpretation

objections are legally incorrect on their face. For example, Easterday Ranches objects to "improper" expert testimony regarding the Family Farmers' knowledge and understanding that their exempt wells draw from certain aquifers. Easterday Br. at p. 24-25. To the contrary, the Family Farmers are entitled to testify as to their own, albeit inexpert, knowledge and understanding of a matter involving their own wells and to explain the basis for their understanding. Washington Rules of Evidence, Rules 602 and 701. The Family Farmers' declarations are obviously not offered as conclusive evidence that their exempt wells draw from these aquifers; rather, they are offered to show that Ecology's failure to require permit applications for groundwater withdrawals exceeding 5,000 gallons per day threatens injury to the Family Farmers' interests in their own water rights. Testimony that is not offered as proof of the matter asserted is, by definition, not hearsay. Washington Rules of Evidence 801(c).[18]

---

regarding exemptions from a regulatory process.

[18] Easterday Ranches appears to have dropped objections to the declarations supporting CELP and the Sierra Club's standing. This is appropriate as organizations demonstrate a cognizable interest when members' enjoyment of aesthetic, recreation, and wildlife values are affected by the matter at issue. *See, e.g., CELP v. Dep't of Ecology*, PCHB No. 96-165 (Jan. 7, 1998). The Supreme Court has repeatedly found that concrete and demonstrable injury to an organization's *activities* results in real injury, such as a consequent drain on the organization's resources, constituting more than simply a setback to the organization's abstract social interests. *See Sierra Club v. Morton*, 405 U.S. 727, 739, (1972) and *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 263 (1977).

Each of the objections to the Family Farmers' declarations fundamentally mistakes the purpose of standing declarations and confuses the question of standing with the ultimate disposition on the merits. Attempts to revise the doctrine of standing by converting a threshold jurisdictional question into a full-blown trial on the merits have been squarely rejected by the United States Supreme Court. *Laidlaw*, 528 U.S. at 181-82. This Court should follow suit, and reject the misplaced attempt to upend the well-established doctrine of standing here.

E. Jurisdiction Was Proper In Superior Court.

Easterday Ranches makes an apparent subject matter jurisdiction argument in the section of their brief regarding standing, an argument as misguided as the rest of their standing issues. This case is appropriately brought under the UDJA, RCW Ch. 7.24. The UDJA allows a court to render an interpretation of a statute and attendant declaration of rights:

> A person...whose rights, status or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020. An action under the UDJA is appropriate where a plaintiff raises a "question of construction or validity" regarding a statute that is, on its face, ambiguous. RCW 7.24.020; *see also Bainbridge Citizens United v. Washington Dep't of Natural Res.*, 147 Wash. App. 365, 374-75, 198 P.3d 1033 (Wash. App., 2008); *City of Federal Way v. King County*, 62 Wash. App. 530, 535, 815 P.2d 790 (Wash. App., 1991).

UDJA actions are properly brought in Superior Court.

In its arguments regarding standing, Easterday Ranches fundamentally misunderstands the nature of the instant action. Here, the Family Farmers raise a question of statutory construction regarding the provisions of RCW 90.44.050. The Family Farmers are not challenging Easterday Ranches' Conditional Use Permit, nor are the Family Farmers challenging Ecology's approval of Easterday Ranches' purchase and transfer of the Pepiot groundwater right, nor the construction and use of a well for the Pepiot Water Right. Rather, the Family Farmers ask this Court to determine a question regarding the facial validity and proper construction of RCW 90.44.050.

This question is properly the subject of an action under the UDJA, and could not have been addressed in any other forum, including a Land Use Petition Act appeal. It would be impossible for the Family Farmers to challenge Ecology's interpretation of the exempt well statute in a LUPA action. Correspondingly, Franklin County lacks the authority to grant or deny water right permits under the Washington groundwater code, RCW Ch. 90.44, so a LUPA action against Franklin County for a decision the County did not and could not make would be incorrect.

It is clear from the Groundwater Code that Ecology possesses the sole authority to grant or deny water right permits. The Groundwater Code specifically delegates to Ecology the authority to administer the code, including the power to grant or deny permits for appropriations of

public groundwater. RCW 90.44.050 ("no withdrawal of public groundwaters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department [of Ecology] and a permit has been granted by it as herein provided"); RCW 90.44.040 ("all natural groundwaters of the state" are "subject to appropriation for beneficial use under the terms of this chapter and not otherwise"); *see also,* RCW 43.21A.064; RCW 90.03.050.

Ecology's decision to grant a water rights permit, or Ecology's general determination that such a permit is unnecessary, is not a "land use decision" as defined by LUPA; indeed, permits to use public property, such as groundwater, are specifically excluded from LUPA's definition of "land use decisions." RCW 36.70C.020(2)(a) (land use decisions are "a final determination by a local jurisdiction's body or officer" on "[a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property"); *see also* RCW 90.44.040 ("all natural groundwaters of the state . . . are hereby declared to be public groundwaters and to belong to the public").

Franklin County, in contrast, has no authority to grant or deny a water right permit. RCW 90.44.040 ("all natural groundwaters of the

state" are "subject to appropriation for beneficial use under the terms of this chapter and *not otherwise*" (emphasis added)). Nor does the County have authority to determine the scope of the exempt well statute independent of Ecology's interpretations in that regard. While Franklin County did require Easterday Ranches to comply with applicable state law governing exempt wells as a condition of its grant of the conditional use permit, the County only looked to whether Easterday Ranches was exempt from permitting under *the State's* interpretation of the groundwater code. CP 1038-39. In fact, Franklin County expressly declined to second-guess Ecology's interpretation of the exempt well statute in the conditional use permit proceeding:

> Intent as it relates to the use of the stock water *would not be interpreted or determined in a County land use process*, but rather be determined and interpreted by the State Dept of Ecology, the Court System (see examples such as *DeVries v. Dept of Ecology*, PCHB 01-073 from 2001), the State's Legislative Bodies, and/or the State Attorney General's Office.

CP 1038 and 1039. Indeed, Franklin County lacked authority to do otherwise—the County could not have determined that Easterday Ranches' water right permit was insufficient if Ecology had deemed it adequate, nor could the County have issued an independent water right. Therefore, appeal of the conditional use permit in a LUPA action would not address the very issue on which the Family Farmers seek review.

Finally, Ecology's approval of the Pepiot Transfer does not implicitly include actual approval of Easterday's reliance on a permit-

exempt well to withdraw water in addition to the amount allowed by the Pepiot Water Right.[19] The only proper issue in a PCHB appeal of the Pepiot Transfer would be that transfer; such an appeal could not challenge Ecology's general interpretation of the permitting exemption of RCW 90.44.050 because the Pepiot Transfer did not include any decisions on the permit exemption. Ecology's own statements in the transfer approval make clear that it made no "decision" regarding a regulatory exemption for water over and above the Pepiot Transfer. In Ecology's approval letter of the Pepiot Transfer, dated June 11, 2009, Ecology makes no reference to the exempt well statute or claims and clearly confines its findings and recommendations, including findings regarding any impairment analysis, entirely to the Pepiot Transfer. CP 867 *et seq.* Ecology's press release, dated June 11, 2009, regarding its approval of the Pepiot Transfer, notes that "Easterday Ranches intends to also withdraw additional groundwater for stock watering at the facility under the state groundwater code's exemption from water right permitting for stock watering purposes." CP 863. Ecology's statements in its press release merely note the fact that the regulatory exemption is indeed claimed by Easterday Ranches for water *in*

[19] The stockwater exemption is an *exemption* from permitting requirements and processes. A regulatory exemption such as RCW 90.44.0505, is, by its nature and language, self-executing. *See, e.g., United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 226 (4th Cir. 1997) (where there was no application or certification requirement in the language of the statute, exemption is self-executing on its face).

addition to the amount allowed under the Pepiot Water Right. There is no "approval" or "disapproval," implicit or otherwise, of the claimed exemption in either Ecology's formal approval of the transfer or the accompanying press release. As with an appeal of the conditional use permit under LUPA, appeal of the transfer to PCHB would not and could not provide review of the stockwater exemption interpretation.

II. THIS ACTION IS NOT SUBJECT TO THE STATE'S RIGHT TO FARM NUISANCE LAWS.

This declaratory judgment action brought by a group of farmers against the State of Washington (and necessarily, by virtue of the requirements of the UDJA, against Easterday Ranches, Inc.) is not subject to the state's so-called "right to farm" laws.[20] The state's "right to farm" laws are actually part of the Nuisances provisions of the Washington Code, chapter 7.48. RCW 7.48.300 makes clear that the purpose of the law is to address conflicts, subject to nuisance lawsuits, between farmers and non-farmers in urbanizing areas. Specifically, the law is intended to protect agricultural activities from nuisance lawsuits by non-farmer homeowners or businesses. *See Buchanan v. Simplot Feeders, Ltd. P'ship*, 134 Wn.2d 673, 678-79 and 681-82, 952 P.2d 610 (1998).

This case is not a nuisance lawsuit. It is a declaratory judgment

[20] The county ordinance tracks the state law. Local ordinances must yield to state law to the extent state law occupies the field, and county ordinances can never conflict with state laws. *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991).

action seeking interpretation of a statutory provision of the Groundwater Code. No damages are sought and injury is claimed only to demonstrate standing to request the statutory interpretation. This case is also not about a conflict between farm and non-farm citizens in an urbanizing area. The Five Corners Family Farmers and Scott Collin are life-long (indeed, generations-long) residents of the Five Corners region, a wholly-agricultural, non-urbanizing area of the state. The Family Farmers and Scott Collin are all farmers, many raise livestock, and the properties in question are all farms and ranches.

Easterday Ranches is a defendant in this action because the UDJA requires inclusion of the party in interest in a controversy in order to avoid the court giving an advisory opinion. That requirement necessitates suit against a farmer or rancher in this instance because the statute for which interpretation is sought is utilized only by farming and ranching operations. In order for any party to obtain a ruling on the proper interpretation of this statute, some action would have to be commenced against a farmer or a rancher somewhere. Clearly, the right to farm law is not meant to bar legitimate claims for declaratory relief on legitimate questions of statutory interpretation.

Further, there is no allegation that Easterday Ranches is violating existing law. The Family Farmers recognize that Easterday Ranches is currently operating under the interpretation of RCW 90.44.050 by the Attorney General. It is the interpretation by the State that the Family

Farmers seeks to correct in this action. Should the State's latest interpretation of the statute be found correct, the Family Farmers agree that there is no violation of RCW 90.44.050.

This case is not the type of case that is covered by RCW 7.48.300 *et seq.* Therefore, Easterday Ranches' claim that the Family Farmers are subject to damages and costs is incorrect, and the Family Farmers ask the Court to deny any such request.

III. NEITHER RCW 4.12.090, NOR THE APPLICABLE OR ANALOGOUS CASE LAW, SUPPORTS AN AWARD OF ATTORNEYS' FEES AGAINST THE FAMILY FARMERS RELATED TO THE CHANGE OF VENUE.

A. Venue Was Not Incorrect In Thurston County.

The Family Farmers' choice to initially file this case in Thurston County Superior Court was not clearly incorrect, and the Superior Court did not so find in transferring venue to Franklin County. Venue in Thurston County was supported by RCW 4.92.010 and the facts of this matter based upon the nature of this action as a purely statutory interpretation question. The applicable case law did not support a ruling that this matter was a local action requiring venue in Franklin County. Washington cases that find a local action (which would have necessitated venue in Franklin County), including all of the cases cited by Easterday,[21]

---

[21] *Washington State Bank v. Medalia Healthcare LLC*, 96 Wash. App. 547, 984 P.2d 1041 (Wash. App. 1999) (redress for damage to real property). *Temple v. Feeney*, 7 Wash. App. 345, 348, 499 P.2d 1272 (Wash. App. 1972), *State ex rel. Hamilton v. Superior Court for Cowlitz County*, 200 Wash. 632, 94 P.2d 505 (1939), and *Ryckman v. Johnson*,

actually involve title disputes—often quiet title actions—or "actions *based on* real property." All of these cases are distinguishable from the matter here. This case is not an "action based on real property" in that it does not require a decision regarding title or interest in real property or a water right. Rather, this is an action based on statutory interpretation and regulatory requirements, requiring a decision regarding legislative intent.

The potential for post-judgment injunctive relief does not change the nature of the statutory interpretation case to a local action. In cases like the one here that may ultimately or indirectly affect property but that are not primarily about "right, title, or interest in" real property, the Washington courts have been reluctant to find that the case is a local action. *See DeLaGarza v. Rennebohm*, 24 Wash. App. 575, 577-78 602 P.2d 372 (Wash. App. 1979) (court found that even though the petitioner's common law marriage dissolution may affect title to real estate, the effect would be a secondary result of her primary claim to impose a trust relationship); *State ex rel. U.S. Trust Co. v. Phillips*, 12 Wn.2d 308, 315-

---

190 Wash. 294, 299, 67 P.2d 927 (1937) (all claims to set aside or cancel a deed or transfer of real property for fraud). *Lefevre v. Washington Monument & Cut Stone Co.*, 195 Wash. 537, 81 P.2d 810 (1938) (quiet title to real property). *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 P. 735 (1901) (determine *title to lands* under water). *Lawrence v. Southard*, 192 Wash. 287, 73 P.2d 722 (1937) (contract to purchase land and the perpetual appurtenant water right to irrigate the land in question). In *Cartwright v. Kulzer*, 140 Wash. 206, 209, 248 Pac. 419 (1926) the plaintiff commenced an action in Spokane County to quiet title on a water right appurtenant to land in Stevens County, when all the parties also resided in Stevens County.

16, 121 P.2d 360 (1942) (action for damages for breach of contract to convey standing timber found to be transitory, even though it related to land and interests therein). The Court in *Phillips* also outlined several other cases with similar results, for example *State ex rel. Scougale v. Superior Court of Pierce County*, 55 Wash. 328, 330, 104 P. 607 (1909), where the Court found that an action in which the plaintiff sought to establish title in an undivided one-third interest in land and timber and a sale and division of proceeds, was transitory for the purposes of venue. The case law is consistent that actions that have a secondary, as opposed to primary, effect on property are not local actions for the purposes of venue. The Family Farmers do not challenge an Easterday water right nor ask for adjudication between water rights, and therefore it was not incorrect for the Family Farmers to venue this action in Thurston County.

In changing venue to Franklin County, the Superior Court ruled on a disputed question of law, one which the court itself acknowledged was "not crystal clear." Appendix, Transcript of Hearing, September 4, 2009, pp. 22 and 27 (hereinafter "T"). The Thurston County court noted, "I don't think that it's [Thurston County] a clearly wrong choice. I've ruled that it's a wrong choice." T. p. 27. The court also found the Family Farmers did not make a "silly argument" and there's a genuine issue of venue in the case. *Id.* The court noted "if it was a pure declaratory action, then it would be transitory" suggesting that the court's choice of moving venue to Franklin County hinged only on the injunctive relief to which

plaintiffs may be entitled post-judgment. *See* T. p. 22. As shown by the case law, such a potential indirect effect does not transform the action to a local one dictating venue in only in Franklin County.

B. The Plain Language Of RCW 4.12.090 Requires More Than Simply Prevailing On A Motion For Change of Venue.

RCW 4.12.090 provides that attorneys' fees on a change of venue are appropriate "if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence." RCW 4.12.090 does not say that attorneys' fees go to the prevailing party in a challenge to venue. To interpret the statute in that fashion would read more into its language than was clearly intended by the legislature. "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen v. Ellsworth*, 162 Wn.2d, at 373 (citations omitted). When the Washington Legislature intends for fees to go to a prevailing party, it says so clearly. *See, e.g.*, RCW 19.108.040; 49.38.050; 59.20.110. The plain language of RCW 4.12.090 requires something more than simply success on the motion to change venue.

C. Reasonable Diligence Is Met When The Question Of Venue Is The Subject Of Valid Legal Dispute.

1. Reasonable diligence applies to a litigant's efforts to ascertain objective, knowable fact.

The phrase "reasonable diligence" is not defined in statute nor is

there a definition developed in the case law. In other areas of Washington law where the phrase is used, it refers to a litigant's efforts to determine a clearly knowable, objective fact as opposed to an open and disputed legal question. For example, it is often used to refer to a litigant's efforts to determine when an injury or property defect occurred or is present. *See, e.g., Peters v. Simmons*, 87 Wn.2d 400, 404, 552 P.2d 1053 (1976); *Levien v. Fiala*, 79 Wash. App. 294, 298, 902 P.2d 170 (Wash. App. 1995). In the employment law context, reasonable diligence is used in assessing when an employer should have known of a condition that violates worker standards, *See, SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 433, 144 P.2d 1160 (2006). Washington courts have also applied the reasonable diligence test to identifying creditors in a bankruptcy. *See Herring v. Texaco, Inc.*, 161 Wn.2d 189, 198, 165 P.3d 4 (2007). Reasonable diligence is an issue in efforts to locate a defendant for personal, as opposed to published, service. *See, e.g., Wright v. B & L Properties, Inc.*, 113 Wash. App. 450, 458, 53 P.3d 1041 (Wash. App. 2002) (citing *Crystal, China and Gold, Ltd. V. Factoria Ctr. Invests., Inc.*, 93 Wash. App. 606, 611, 969 P.2d 1093 (Wash. App. 1999)). None of these applications concern prevailing on competing, legitimate, *legal* arguments.

Applying a similar rationale to the matter at issue here shows that fees are not warranted in this case, where the Family Farmers followed the venue requirements for suit against the state on a matter of state-wide

application and importance, and where the court acknowledges the issue was open to question and reasonable legal arguments were made.

2. In cases under RCW 4.12.090, failure of reasonable diligence generally requires acts that are comparatively frivolous or in bad faith.

There are few cases that have addressed the issue of fee awards under RCW 4.12.090 with only one published decision that is readily distinguishable from this case. In *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wash. App. 927, 937-38, 147 P.3d 610 (Wash. App. 2006), the court awarded fees on a change of venue matter where the plaintiff initiated suit in Pierce County when plaintiff had contractually agreed to a forum selection clause for Spokane County. Further, defendant had alerted plaintiff to the forum selection clause and had requested transfer. The court found plaintiff's continued insistence on its venue choice unsupportable when plaintiff had signed the forum selection clause and when federal law, to which the State of Washington looks on this matter, clearly provides that forum selection clauses control venue. *Id.*

Citing *Keystone*, the court in *Moore v. Flateau*, 154 Wash. App. 210, 220, 225 P.3d 361 (Wash. App. 2010) changed venue and directed an award of fees on facts similar to those in *Keystone*. In *Moore*, the plaintiff had failed to exercise reasonable diligence in determining the county of defendant's residence.

The situation in these cases differs substantially from that before the Court here. In each of the above cases, the plaintiffs' position was clearly unreasonable and unsupported by either the facts or the applicable law. There was no open or even close legal question on the issue of venue. There is little support in Washington case law for an award of fees against the Family Farmers in this case where the question regarding venue is, as the Superior Court has noted, "[not] clearly a wrong choice," subject to "some vagueness," "both local and transitory," and "not crystal clear." T. pp. 23, 25, 27.

IV. THE CONCEPT OF INVITED ERROR DOES NOT APPLY TO THIS CASE.

Easterday Ranches' argument regarding invited error completely misapplies this body of law and should be disregarded. As can be seen from the record, the Franklin County Superior Court denied the Family Farmers' summary judgment at the hearing on April 2, 2010. The Family Farmers stipulated that the order drafted by the Agricultural Associations and the State best represented the Superior Court's oral ruling, and the court itself also accepted that order as best representing its ruling on April 2, 2010. By agreeing on the proposed written order, representing a ruling that the court had already made, the Family Farmers did not invite a ruling against themselves. Such a suggestion is simply meritless.

To the extent that any further response is necessary, a quick review of the case law that invokes the principle of invited error demonstrates it

does not apply here. The case law primarily concerns jury instructions or evidentiary rulings and a party's affirmative support or submission of a jury instruction or evidence it later complains is incorrect.[22] The law does not remotely apply to parties agreeing to the form of an order that memorializes a ruling already made. The Family Farmers ask the Court to reject this argument.

CONCLUSION

This case raises a single substantive question of first impression for this Court: is the stock-water exemption to groundwater permitting in RCW 90.44.050 limited in quantity, as one of a bundle of domestic uses, to 5,000 gallons per day? It is plain from the language of the Groundwater Code and RCW 90.44.050 as a whole, supported by the rich historic context and record, that the correct answer is yes. Respondents' proffered interpretation is inconsistent with the intent of the Groundwater Code, contradicts the historical evidence, conflicts with other statutory provisions in the Code, and is ultimately based solely on an argument that there is one true grammatical reading of the provision, and as such, results in a tenuous and unreasonable result. The Family Farmers respectfully

---

[22] *See, e.g., State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010); *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009) ("the doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so"); and *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wash. App.572, 589, 187 P.3d 291 (Wash. App. 2008).

request the Court to reverse the decision of the Superior Court that the stock-water exemption is unlimited and to deny Easterday Ranches' cross-appeal in its entirety.

Respectfully submitted this 6th day of October, 2010.

JANETTE K. BRIMMER (WSB #41271)
KRISTEN L. BOYLES (WSB #23806)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 *[FAX]*
Attorneys for Appellants

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

FIVE CORNERS FAMILY FARMERS, SCOTT COLLIN, THE CENTER FOR ENVIRONMENTAL LAW and POLICY, and SIERRA CLUB, Plaintiffs, vs. STATE of WASHINGTON DEPARTMENT of ECOLOGY, and EASTERDAY RANCHES, INC., Defendants.	SUPERIOR COURT NO. 09-2-01622-1

THE HONORABLE RICHARD D. HICKS PRESIDING, DEPARTMENT 3

Motion hearing
September 4, 2009
2000 Lakeridge Drive SW
Olympia, Washington

Court Reporter
Ralph H. Beswick, CCR
Certificate No. 2023
1603 Evergreen Pk Ln SW
Olympia, Washington

A P P E A R A N C E S

For the Plaintiffs:	Janette K. Brimmer Attorney at Law Earthjustice 705 Second Avenue, Suite 203 Seattle, WA 98104
For Easterday Farms:	William Louis Cameron Lee Smart 701 Pike Street, Suite 1800 Seattle, WA 98101-3929
For the Department of Ecology:	Maia D. Bellon, AAG PO Box 40117 Olympia, WA 98504-0117

****

THE COURT: The next confirmed case is Five Corners. I'm going to read from my notes here in the hopes that this will shorten things. There are actually two sets of motions. There's a motion to change venue from Thurston County to Franklin County, and then there are two motions to intervene, one by the irrigators association and another by the Washington Cattlemen's Association. I'm going to hear the motion regarding change of venue first. Here's what I understand. I could maybe say this from memory, but I've been thinking about this case because originally it was going to come last week and then it got continued to this week.

Defendant Easterday Ranches has a motion to change venue to Franklin County on the grounds that jurisdiction is found there pursuant to RCW 4.12.010 because the property of all the parties is located there and this case either affects the title by limiting the property use or is injurious to the defendants, as they claim, by damaging their property, plus, even if water is a usufruct, the well, well casings, consumption of water and so on, are articles of personal property all located in Franklin County. In short, they argue that this is a local action where jurisdiction should be where the property is located. In addition, the nature

of this action is not just for money damages but to stop the use of the property in order to protect other property of the plaintiffs.

They further give as an example *Cartwright versus Kulzer*, a case I had to read a couple of times to understand, which dealt with an alleged water right appurtenant to lands in Stevens County and all the parties were in Stevens County. The action was brought in Spokane County. And although the *ratio decidendi* of the case dealt with an interesting and unusual jurisdictional argument, it is also clear such water actions are local in character. They further argue that even if venue can lie outside Franklin County by arguing that this action is transitory, since it seeks a declaratory judgment, which they argue is ignoring the essence of the action which requires a real party at interest and an injunction and not an award of damages so as not to be merely giving an advisory opinion regarding a statute being enforced or tolerated by the Department of Ecology, that venue is properly moved pursuant to RCW 4.12.030 since not only is the subject matter there, but all witnesses are there, and not only their convenience but the interest of justice calls for this action, about which there is so much local interest, to be heard there.

The plaintiffs on the pleading paper identified as Earthjustice, but it's the Sierra Club, and there's the Center for Environmental Law and Policy, and then there are five family farmers from Franklin County who have the real property which would allegedly be damaged by the exhaustion or overuse of the aquifer. They oppose a change alleging that this is a declaratory judgment action involving the state and that venue pursuant to RCW 4.92.010 allows the suit in Thurston County. They also argue that this is not a "local action" since this doesn't involve validity or priority of a water right but only the state's interpretation of RCW 90.44.050. They claim that the state is the "primary" defendant but that there must be a live controversy so as not to involve an advisory opinion and thus defendant Easterday is brought in. They further argue the choice of venue first lies with the plaintiff and that such should not be disturbed unless the balance is strongly tipped against it. They argue a transfer to Franklin County is not necessary to accommodate witnesses because this case will be resolved on summary judgment based simply on agreed facts that Easterday uses "some amount" of groundwater for watering livestock without a permit and there is no need for any live witnesses.

To this Easterday replies this action seeks an

injunction for Easterday to cease using a well it has drilled at considerable expense and has placed in beneficial use and this can't be taken without just compensation and is an integral part of their land, and Department of Ecology, despite being a codefendant, does not align with Easterday but more with plaintiffs. They argue water rights are property and suits affecting them are not transitory but local. Plus in this complaint some of the plaintiffs are alleging their property is being harmed by Easterday and these plaintiffs, like Easterday, are necessary parties of this suit or it would not lie at all. You cannot have a declaratory action in a vacuum as an academic exercise. There must be (1) an actual dispute, (2) parties with opposing interests, (3) substantial interest at stake, and (4) a judicial determination will be final. And they argue injunctions and other actions for equitable relief are local in nature and the defendants' position that there will be no need for witnesses and thus the rules regarding convenience of witnesses should be ignored has no authority, and they don't cite any authority for such a proposition.

That's what I understand so far. And basically this is an interesting case. I've had some interesting water cases like *Theodoratus* and some others. So this is an

interesting case for me. I was also on the --

MS. BELLON: -- Water Disputes Task Force too.

THE COURT: You know more about it than I do. Right. I was on that task force. All of that interests me. I do recognize the potential problem in RCW 9.44.050 which doesn't seem to have any cap on watering stock as an exception to the otherwise required permit process, whereas other domestic uses and 5,000-gallon-per-day limitations and so on exist otherwise, and so it makes sense to me that DOE probably does align with the Sierra Club and Earthjustice even though they're named as the defendant here, but not necessarily.

And I was also interested to read that an equally large problem, which is the other end of the cow, and how that's handled in relationship to the groundwater and the aquifer has apparently at least introductorily been resolved by some other actions, and so I'm interested in what everybody has to say. I want to do the right thing by whatever the rules are, even though I kind of have a sense that this is really more important -- maybe that isn't the right word. This is more notorious I guess would be the word that would fit -- in Franklin County in Eastern Washington than it is over here, and secondly, it's going to end up over here

anyway because I don't think this is going to be resolved by any trial judge, but I'm willing to listen.

MR. CAMERON: Thank you, Your Honor. My name's William Cameron. I represent Easterday Farms. A little bit about myself: I practiced law for over twenty years in the Tri-cities so I'm well acquainted with this situation here. I practice law in Seattle and I practice law in Pierce County. I represent the City of Rainier here in Thurston County. And you know, if you were to ask me were it just the fair-mindedness or the sagacity of the court I was to be in front of, I couldn't pick a better place than Thurston County.

But this is a question of whether or not we should be in Franklin County or here. The plaintiffs themselves claim that they have a property right in their wells and it's going to be injured by Easterday's conduct. That's the essence of it. So they are complaining of injury to their real estate, their property rights and their water rights. That makes it a local action. Easterday's defending, hey, I already got my well dug. It's 16,055 feet deep. It's a foot across, a third of a mile down in the ground. It is in operation. I talked to co-counsel yesterday who talked to Mr. Easterday. It's working; it's running, and he's watering cows with it. So this is not just an academic exercise. It's in

progress. It's not a done deal because there's litigation. But the fact is is that he is in fact using his property. This affects it. That makes it a local action.

In their response, the plaintiffs don't even talk about the injunction they're asking for. I think their position is, well, that may come a little bit later. Well, yes, but it's an injunction to keep him from using his well, and that's what they're asking for. And that is inconsistent with his right to use the well. As things stand right now he has a right to do that. Again, that makes it a local action, and that makes it happening there. They want to enjoin his property rights. Well, so that's I think a local action.

So the question before the court is, is if it is, and there's just a remote chance that it is, why isn't this case sent to Franklin County to start?

THE COURT: Well, I was following you until you said "remote chance" because generally under the law local actions are discouraged, but they still do exist.

MR. CAMERON: They do exist, and when they do, it's a question of we get to Court of Appeals or the Supreme Court and they say, yeah, it was a local action. You lose. Case dismissed. I mean we've wasted a lot of time because there's simply nothing that happened. Even

a stipulation of the parties is not sufficient to overcome the fact that you have to bring a local action, has to be commenced in the county where the property is situated. And there is simply no exception to it. So why wouldn't sending it to Franklin County be the safest thing on earth to do today to make sure that we don't spend a lot of time and energy over nothing?

And I think that the evidence is overwhelming that this is a local action. It involves water rights, plaintiffs and defendants both claiming them, both in existence at this time. That makes it a local action. Supreme Court said water rights are local actions, and that's what they're about.

My second pitch is of course, well, if it isn't, we think there's some factual issues that are going to be involved in this. For example, the plaintiffs draw their water from what is called the Wanapum Aquifer out there. Mr. Easterday's well is far below that. It's cased. Do they really have any standing to complain about him taking it from another aquifer? It is actually a thousand feet below sea level. It's not affecting the Sierra Club, not affecting the so-called family farmer. So those factual issues may need to be resolved with witnesses. We've listed I believe 17 witnesses. Nobody else has listed another witness.

They're all in Eastern Washington. So why wouldn't we send this at least discretionarily to Franklin County? Thank you.

THE COURT: Thank you. Who's on that side?

MS. BRIMMER: Of the other side or the other defendant?

THE COURT: Of this issue. Let's hear all one side of the issue at one time and then the response.

MR. CAMERON: She's definitely on the other side of the issue.

THE COURT: So then are you --

MS. BELLON: I'm Maia Bellon, assistant attorney general representing the State of Washington.

THE COURT: My question is you're also a codefendant, but you are actually opposing.

MS. BELLON: We do not oppose changing to Franklin County. We just believe that ought to be under a discretionary standard rather than a RCW 4.12 standard because we're concerned about the precedent of whether that particular statute, when you have a bundle of the stick, a water right or an intent to use water right, whether that triggers the real effect of real -- the affecting title and real property under RCW 4.12.010.

THE COURT: Right.

MS. BELLON: That's our distinction. It's a

nuance.

THE COURT: As Professor Johnson used to say at the University of Washington Law School, that property is a faggot of sticks, and that term, which has other connotations today, but in the law would mean a bundle of sticks, and even though water's a usufruct, once it becomes appurtenant to the land, it would be one of those sticks in the bundle.

MS. BELLON: Under the *Rigney* standard in the case that I cited in my briefing we do believe that it becomes an interest in real property as a bundle of the stick, but there are questions, including under *Theodoratus,* that say you do not get essentially your water right until you have beneficially used it and apply it to the land, so because there were some factual questions there, the state was concerned about a 4.12 required moving and changing venue versus a discretionary based on factual issues and other issues, Your Honor.

THE COURT: In this case I'm not going to take us back to the old riparian theory that was common in England and the East Coast and that was pretty much changed by the western states because of the problem with water to now appropriation by and beneficial application in order to maintain water rights and the

confusion about all that in the state of Washington, nor how the legislature controls the Department of Ecology by underfunding them.

MS. BELLON: Yes, Your Honor.

THE COURT: They can't enforce the laws that they're supposed to enforce.

MS. BELLON: Yes, Your Honor.

THE COURT: I know something about all those things.

Counsel.

MS. BRIMMER: Thank you, Your Honor. Your Honor, I'm Janette Brimmer. I'm an attorney with Earthjustice, and we are representing the plaintiffs here, the Five Corners family farmers which are in fact more than five families. There are a number of families in the area that are affected, as well as the two environmental organizations. And I want to begin with saying that we are opposed to the motion to change venue.

THE COURT: How does this want to be said in an appropriate way? I mean they are the underlying real property in interest, and one would think they'd want this heard in the county in which they live and which this water is, but then overlaid over this is your, I think, nonprofit organization and the Sierra Club, which

is good that you can step in and help people that otherwise couldn't maybe afford these kind of legal services, but why wouldn't they want this heard where they live?

MS. BRIMMER: Your Honor, plaintiffs have chosen venue in Thurston County for a variety of reasons: One, they believe it actually is more favorable and convenient for them due to the fact that they've got lawyers in Seattle, that they are mindful of the costs. They're concerned I think about some of the furor over this case in Franklin County.

THE COURT: So you're billing them?

MS. BRIMMER: No. In fact we are not billing them. As you know, under the rules, the parties though are responsible for the out-of-pocket costs. I think that the important consideration here for venue -- and that's what I want to direct the Court's attention to. I feel that Mr. Cameron's not reading the pleadings that I wrote in some respects. This is a case about statutory interpretation, which, as the Court knows, is a question of law, which is why we believe that this case can proceed on summary judgment, not have a lot of witnesses. More importantly, it's not a case about -- this is what it's not about: It's not about a water right. There's no argument about priority of --

THE COURT: Is it about an injunction?

MS. BRIMMER: It may eventually be about an injunction. As you know, under the declaratory judgment statutes we proceed first to declaratory judgment, but we can ask the court to then enforce any judgment that comes out of that or issue any injunctive relief that might be necessary to ensure that the declaratory judgment is fully enforced and that the plaintiffs get full relief.

THE COURT: If I were to rule, or a Superior Court judge in Thurston County were to rule that, you know, even though this statute has been interpreted consistently for fifty years by the Department of Ecology, it doesn't really make sense because it in effect would allow unlimited extinguishment of an aquifer -- and I haven't forgotten about the two aquifer argument here -- and essentially would allow unlimited water use to the detriment of other people, that surely there must be some kind of limitation here. So despite fifty years of it being enforced one way, time alone doesn't protect -- how does this want to be said? -- an incorrect understanding of the statute and therefore at the most this can only mean watering stock that doesn't exceed 5,000 gallons per day and therefore I'm going to issue an injunction. I'm going to then be issuing an

injunction enforceable regarding property in Franklin County?

MS. BRIMMER: Actually, Your Honor, let me back up a little bit. The statute under consideration -- the statutory interpretation under consideration on whether or not stock water is subject to the same regulatory process or some limitations, if it's going to be exempt, as other exemptions and as other requirement in the groundwater code, is not -- has not been interpreted consistently by the Department of Ecology for fifty years. In fact, for sixty years, from 1945 to 2005, the Department of Ecology and the State of Washington --

THE COURT: '45 is when this statute was passed.

MS. BRIMMER: This statute was passed in 1945. From '45 to 2005 Ecology and the State of Washington in fact interpreted this statute as limited, in other words consistent with the arguments that plaintiffs expect to make in this case, and in fact argued that case strenuously to the Pollution Control Hearings Board and successfully to the Pollution Control Hearings Board in the *DeVries* case. Following the *DeVries* case there was a request from some legislators to the AG for an opinion, and in 2005 the Attorney General, the current Attorney General, reversed and issued an opinion going the other way in saying it was unlimited.

So there is a definite concern about statutory interpretation here, about the intent of the legislature being properly carried out. That is a proper question for Thurston County. It is a proper question for a question of law and for summary judgment.

Now, if and when we get to that point and if and when for example if you were to keep the case, you were to rule on that and say yes, I think that in fact the legislative intent was such that the stock water exemption is limited in amount, there is an exemption but it is limited in amount, then to the extent necessary, we would perhaps be asking this court to issue injunctive relief.

Now, I think it's premature to worry about that. It's conceivable in my read of the Declaratory Judgment Act that we could take a judgment and get it enforced in Franklin County, if that actually became necessary at that time and if the Court were concerned about venue over that part of the action, but I think that at this point in time we haven't heard any arguments that would outweigh the plaintiffs' choice of forum in this case. I mean, I've heard a lot about this being about a water right. It's not about a water right; it is about a regulatory process, to what extent do the Easterdays have to conform to a regulatory process and get a

permit. It is not about the well that they have drilled. They have a transferred water right, which we are not challenging and which is not at issue in this litigation, that served as the basis for them drilling that well. This is really all about statutory interpretation. We think that the list of witnesses, there's no need for this court in determining what the legislature meant to hear from well drillers, to hear from the Easterdays, to hear from neighbors, to hear from county commissioners. As this court knows, none of that is necessary to statutory interpretation, where instead this court looks to the language of the statute, looks to the historical context and looks, if necessary, to any legislative history.

There were also I think some intangibles that we would take strong issue with that were raised in the Easterdays' pleadings, particularly in the reply. We take issue with the fact that Franklin County judges are somehow more adept at this kind of matter and won't need water rights and relative workings of cows or irrigation explained to them. I think that as the case law points out, all of the judges in all of the counties are able to handle the questions that come before them equally, and I think something like the wheels of justice grind equally in each county of the state, and I think that's

very true here so we would disagree with that argument.

The argument about lots of local interest, that there are a lot of local newspaper articles about this I think is neither here nor there, Your Honor. It's not generally recognized in the statutes as a reason to transfer venue. In fact, in some of the case law it's a reason to take venue out of the county if some of the interest looks like it could interfere with the adjudication of the case. At any rate, it's not a reason to change venue here. It doesn't override plaintiffs' choice. It does not involve application of forum law. In fact, it involves, as I said, statutory interpretation which seems quite appropriate here in Thurston County. So we oppose the motion to change venue. We think it is proper here.

THE COURT: All right. I read all your cases, and I even read the federal cases by Judge Lasnik recently and involving Trout Unlimited and the Ninth Circuit case that says water actions are local in character and not transitory, and I was really interested because I don't think I had read this before -- maybe I did -- to read this case that started when Washington was still a territory involving Whatcom County and the appropriation from the creek up there in Fairhaven, which that gave some insight, not just

because of its holding, but because of the survey that it did of other western states at that time.

Now, of course, you all know more about this than I do, although I find this an area of some interest. In my view, the water is to the planet just like the blood in the human body, and I think it's all interconnected. And I had a case not too long ago that I thought maybe would help resolve things that had to do with metering and the difference between surface waters and groundwater. To my view, which I don't mind confessing, it's all related. It's all connected. Even water that's separated and becomes brackish either goes into the earth or back up into the atmosphere. It's never extinguished, or if it does become sufficiently extinguished, then we won't be living on this planet any longer.

So clearly all the water is just like blood in the body and connected, which causes problems when there's more than one people want to use a particular source, and sometimes involves sovereign states like between Canada and this country, of America, between America and Mexico, with the rivers that flow through. So it's a big issue, and this would be a good place for a young law student to begin to specialize in because growing up here, whoever thought there would be problems and issues

with forest or water? As a kid everybody was either a logger or a fisherman and you thought it was never going to be extinguished, and both those things have turned out to be finite unless they're properly managed to become renewable resources.

After that little political speech, I think the correct way to resolve this is even though there is a declaratory judgement action on the table here, the essence of this, in order for it to have integrity, it has to be the action between the two landowners. That's why Easterday is made the defendant. That's why the people who are just as concerned about the landowners themselves have the landowners themselves in as a real party at interest. Otherwise, this would be not allowed under declaratory action because nobody would have standing and the court would be giving an advisory opinion.

What I was looking for in this case is there is a case, and I think it involved a logging contract, but it said, you know, counsel argue that this is a transitory action because they're just seeking to enforce a contract, and the court said yes, but the essence of this is going to be this injunction. And I think that the essence of this action really is between these two groups of landowners, and even if there are two

different aquifers at issue, I think my ruling should be that this is a local action, even though there is some vagueness -- I don't think it's crystal clear -- and that if it was a pure declaratory action, then it would be transitory I suppose, but I think the essence of this does make it of local character, and so thanks to that Spokane County case, I think I have jurisdiction to change venue. I don't think you can win an argument that would say, well, he doesn't have jurisdiction because it's a local action. The judge can't change venue.

I also think that even though it's a seductive argument to say we don't need to consider the convenience of witnesses or the interest of justice because we're going to be able to resolve this with declarations and expert reports, that the court shouldn't jump ahead and say I'm going to telegraph that's the kind of ruling I'm going to make so there never will be a witness heard and therefore the party asking for change of venue can't avail themselves of the fact that almost everybody, and certainly everybody that's been identified in this case, lives over in the Tri-city area, and yes, there may be experts coming from who knows where and counsel may come from Seattle or Olympia and so on, but it isn't for the convenience of

counsel that we make change of venue but for the convenience of parties. So even if the Supreme Court were to reverse me that this is not a local action but a transitory action, I would also change it for convenience of witnesses and the interest of justice.

And also having been a judge a long time, it seems to me that this is also respectful to the people of Eastern Washington and Franklin County because if they don't like what the Franklin County judge does, what he or she does -- and I do believe that in every jurisdiction there are competent, impartial judges. Even though we see a lot of these Department of Ecology cases in Thurston County, there are some good judges over there. Maybe they're all good judges, but there are certainly good judges over there.

And it seems to me that this case is going to finally be decided in Olympia. It's going to be decided here at the Supreme Court level. I mean, maybe you'll get the Court of Appeals in Division III to give an opinion that the Supreme Court won't take from or maybe they'll accept a direct appeal, but this is an important issue, and I think there's a good chance it will be heard by the Supreme Court, and I think there's a very slim chance that any judge, whether it's in this county or in the Franklin County venue, is going to have the last say

about this. And if it is truly, as argued by the plaintiffs here, simply going to be a matter of law and we're never going to get to the trial stage because it's going to go up under CR 54 after a ruling on a summary judgment, it's going to come back here, but at least the people in Eastern Washington will have had their say about land in Eastern Washington, land in Franklin County, an aquifer that may provide water to more than just Franklin County, but all of it certainly in Eastern Washington, and I don't know too much about the deeper aquifer except I do know there are aquifers of different depth and that one may affect another, but not necessarily so.

So I apologize for making you all stand there. I'm going to grant the motion to change venue. Motions to intervene I'm going to withhold ruling on because I think that should be decided by the Franklin County court.

MR. CAMERON: One other issue, Your Honor.

THE COURT: All right.

MR. CAMERON: That the only other question is is if the plaintiffs could have determined that Franklin County was the proper --

THE COURT: I was afraid you were going to ask me that.

MR. CAMERON: And if they could have, we're

supposed to be awarded our reasonable attorney's fees for that, and I know that's putting you on the spot, but it is something that the statute --

THE COURT: If you hadn't asked that, I don't think I would have been reversed.

MR. CAMERON: Well, nobody said that Franklin County isn't a proper place. I mean, we're definitely going to wind up there, we'll be okay.

MS. BRIMMER: Your Honor, if I may address that.

THE COURT: Yes.

MS. BRIMMER: I think that the plaintiffs made an appropriate choice in venuing this in Thurston County. It's appropriate under the statutes. I think that it is not a local action. While the Court retains the ability to discretionarily change venue, which you've said that you would do, and we'll happily go to Franklin County under that order, I don't think this is an appropriate case for attorney's fees.

THE COURT: Here's what I don't know the answer to. A lot of things I don't know the answer to, but when an action has characteristics that are both local and transitory, then does the local action trump the transitory on the attorney fees issue or is it an issue of ratio or proportion? For instance, I've granted you relief whether this was local or transitory under the

change of venue statute, but I've also ruled that this is a local action because the essence of it are these underlying effects on property, injury or limitation of use of property which sometimes is called title. But I've made an alternative ruling here, that it doesn't make any difference whether it's local or transitory. My question on the attorney's fee issue is should they be granted at all, or if they should be granted, should they be granted in total, or because of the dual nature of the declaratory judgment being the primary driver here, although the essence of it is something deeper than that, namely the injunctions in land use, should there be some ratio regarding attorney fees?

MR. CAMERON: Your Honor, I think the answer to that question is in the transfer statute itself, 090, and it's the mechanics of moving it. If it had just been discretionary, then we have to pay to move it. You also ruled that it's a local action so they have to pay the new fees. And so the motion is properly made under 030. Whether it's a local action, we say it needs to be commenced someplace else or anything else, RCW 4.12 comes into play in its entirety. You're correct; the Supreme Court said that no, you don't just dismiss it because you're in the wrong county. You do have authority to move it someplace. And so the question is

-- and you have ruled that it's a local action. The question is is if they could have determined that -- and that's what the statute -- "...if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence," not jurisdiction mind you, but venue, "it shall order the plaintiff to pay reasonable attorney's fee of the defendant for changing the venue..."

And so I think that if you look at this from an objective standpoint, they made the choice to come here, and it's clearly a wrong choice.

THE COURT: I don't think that it's clearly a wrong choice. I've ruled that it's a wrong choice. I think under the statute I guess what I'll do is this: I'll place the cost of removal insofar as the clerk's fees and everything of that nature on the plaintiffs, to be consistent with my ruling, and I'll consider some limited attorney's fees, limited only to this action about the change of venue and that this is a local nature. I don't think it was crystal clear. I don't think they made a silly argument. I think there's a genuine issue here.

MR. CAMERON: I'm not arguing that it's frivolous, Your Honor.

THE COURT: So I'm going to urge you to see if

you can come to some agreement. Otherwise, I think you can bring the attorney's fee issue to me, and of course I'll have to use the lodestar issue, but I might want some more briefing on this, and let's see if the two of you -- I don't know if the state wants to be in -- the seven of you that are involved here can't come to some agreement. If not, then I think I would have to award some reasonable attorney's fees in relationship to the cost of moving it because I am ordering that the cost falls on the plaintiffs here.

MR. CAMERON: I'm going to have to re-do the order. I did one for each. I didn't do one for both so I would like to present that. Perhaps we could just continue that a week.

THE COURT: Sure.

MR. CAMERON: For presentation.

THE COURT: Yes.

MS. BRIMMER: Your Honor --

MR. CAMERON: And we'll work on it.

MS. BRIMMER: I would like an opportunity to brief that should it arrive at that point in time.

THE COURT: If you can't agree, I'll accept briefs from both of you on that.

MS. BELLON: Your Honor, just for clarification, the state did not bring the motion and the state did not

object to venue. It was pointing out the nuance with regard to 412.

MR. CAMERON: They're not on the hook for anything.

MS. BELLON: We want to make sure that that's clear, Your Honor, that we're not on the hook for attorney fees.

THE COURT: We have very competent counsel here. I know that's a little patronizing. This is an important issue. I've sent it over to the Franklin County judge. He or she may not appreciate it. I've some hope that maybe you can resolve the attorney fees issue in a modest way because it's not really the main thing at issue here. The main thing at issue here is what's going to be done with RCW 9.44.050 and the injunctions that might ensue depending on how it's interpreted. So I'm asking for some cooperation, but you know, I get paid to make decisions; I'll make them.

MR. CAMERON: Thank you.

MS. BRIMMER: Thank you very much, Your Honor.

THE COURT: You don't have to re-note it. But you might need more time. Do you need two weeks?

MS. BRIMMER: Two weeks would be great, Your Honor.

MR. CAMERON: Other than I'm going to be here

next week, but --

THE COURT: You represent Rainier anyway.

MR. CAMERON: If we can't work it out, we'll re-note it.

THE COURT: Thank you. Well, you can re-note it. I'll just say yes, that's still outstanding. If you don't resolve it, please re-note it and I'll read your briefs and make the call.

MS. BRIMMER: Thank you, Your Honor.

****

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, RALPH H. BESWICK, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter as designated by Counsel to be included in the transcript and that the transcript is a true and complete record of my stenographic notes.

Dated this 9th day of September, 2009.

RALPH H. BESWICK, CCR
Official Court Reporter
Certificate No. 2023